Supreme Court, U.S.
FILED

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No._____

In the
Supreme Court of the United States

JANICE GRAY, Petitioner

-v-

ENTERGY OPERATIONS, INC., Respondent

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDICES
(PETITION FOR WRIT OF CERTIORARI)

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38 pp

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JANICE GRAY **PLAINTIFF**

VS. **CIVIL ACTION NO. 5 : 99CV62BN**

ENTERGY OPERATIONS, INC.,
DON HINTZ, MIKE BAKARICH,
JOSEPH HAGAN, AND MARY SEE **DEFENDANTS**

FINAL JUDGMENT

In accordance with the Opinion and Order entered this day granting the motion of defendants for summary judgment, Plaintiff's claims are all hereby dismissed with prejudice.

SO ORDERED this the 2nd day of March, 2000.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW the Defendants, Entergy Operations, Inc. ("EOI"), Don Hintz, Mike Bakarich, Joseph Hagan and Mary See (hereafter collectively referred to as Defendants), and move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to grant summary judgment to the Defendants, against the Plaintiff, Janice Gray, because there are no material facts in dispute, and Defendants are entitled to judgment as a matter of law, and as cause therefore state the following:

1. Janice Gray filed this action against the Defendants, alleging that she was discriminated against on the basis of her black race, in violation of 42 U.S. C. §1981. The discriminatory actions that she alleges in her Complaint concern not being promoted to the positions of Site Administrative Programs Coordinator, Administrative Coordinator, Senior Secretary, Secretary III, Senior Procurement Specialist and Secretary. She has withdrawn her claim with regard to all positions other than Secretary III and Site Administrative Programs Coordinator. Although she met the

minimum qualifications for the latter position, Karen Rucker, a white female, also met the minimum qualifications and she was chosen. Ms. Rucker had many additional qualifications that Ms. Gray die not have, which made her a better candidate, and it was a business decision by the interviewing panel that she should fill that position. Ms. Gray cannot prove that this legitimate nondiscriminatory rationale was pretext for discrimination. With regard to the position of Secretary III, a black female was promoted to fill the position, and therefore Ms. Gray cannot prove a prima facie case of race discrimination.

2. Ms. Gray also alleged in her interrogatory responses and depositions that she was not promoted to the positions of Office Services Supervisor and Senior Procurement Specialist in September 1999. Ms. Gray never amended her complaint to include those promotions, and therefore they are not property before this court. Even if she had, the person who was chosen for the Office Services Supervisory position is a black female, and Ms. Gray therefore cannot prove a prima facie case, not pretext to prove her claim of racial discrimination. A white female was chosen for the position of

Senior Procurement Specialist, but EOI made the legitimate, nondiscriminatory business decision to promote her because her qualifications for the position exceeded those of Ms. Gray's. Ms. Gray cannot prove that this decision was a pretext for discrimination.

3. Ms. Gray alleges that she has been discriminated against in her pay by receiving less than white employees in her job classification. Because Ms. Gray, whose title is Office Services Assistant, is the only employee at Grand Gulf in that classification, she has no similarly situated non-minority employees with which to compare herself, and she therefore cannot prove a prima facie case of race discrimination. Nor does she have properly compiled statistics to prove such disparity, or to prove that any disparity that may exist is a pretext for discrimination.

4. Ms. Gray alleges that she has been discriminated against with regard to her working conditions, because she alleges that Grand Gulf maintains, "black jobs" and "white jobs." However, she has no properly compiled statistics to prove this claim, and, since she is the only employee in her job classification, she cannot prove that

she is in a "black job." Moreover, working within a "black job," if such even exists, is not an adverse employment action that would afford an employee a cause of action by stating a prima facie case of discrimination.

5. Ms. Gray alleges that she was discriminated against by being ranked a "nine" for one year, which was the lowest rank available under the ranking system in affect in 1996. However, receiving a poor evaluation is also not an adverse employment action that would afford an employee a cause of action, especially since she suffered no adverse ramifications from ranking, i.e. she received a pay increase that year, she was not placed on an improvement plan, and she was not terminated no threatened with termination because of it.

6. Ms. Gray has alleged discrimination based on receiving subjective performance appraisals. However, the facts show that she did receive objective evaluations and even if she had not, without other evidence indicating that the subjective evaluations are a mask

or a pretext for discrimination, she cannot state a claim for discrimination.

7. Ms. Gray has not alleged nor proven that the discrimination she alleges is a continuing violation, and therefore this Court should not consider any discrimination outside the three year statute of limitation period.

8. All individual defendants should be dismissed, because Ms. Gray has no evidence of individual intent on their parts to discriminate against her with regard to her promotions. She alleges in her Complaint no action by them with regard to any of her other claims.

9. Attached to this Motion and incorporated herein are the Affidavit of James M. Cooley, and all exhibits and deposition excerpts referenced in the Memorandum in Support of this Motion.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that this Court grant this Motion for Summary

Judgment, dismiss this case with prejudice, and award to Defendants their cost and attorney fees.

Respectfully submitted,

ENTERGY OPERATIONS, INC.
DON HINTZ, MIKE BAKARICH,
JOSEPH HAGAN and MARY SEE

DOUGLAS E. LEVANWAY, BAR NO. 1206

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OPINION AND ORDER

This cause is before the Court on the following motions: (1) Motion of Defendants for Summary Judgment, and (2) Plaintiff's Motion to Strike the affidavit of James Cooley. The Court has considered the motions, responses and all supporting and opposing memoranda. The Court finds that the motion to strike should be denied and that the motion of Defendants for summary judgment is well taken and should be granted.

I. Background

Plaintiff, a black female, has worked for Defendant Entergy Operations, Inc. ("Entergy") and its predecessors in interest at the Grand Gulf Nuclear Station in Port Gibson, Mississippi ("Grand Gulf facility") since 1978. She has held a variety of positions such as Clerk Typist, Night Shift Supervisor, and Office Services Coordinator. Plaintiff filed this lawsuit on March 12, 1999, alleging

racial discrimination in violation of 42 U.S.C. §1981. The complaint contains the following causes of action:

(1) failure to promote Plaintiff on the basis of race,

(2) payment of disparate wages to Plaintiff on the basis of race, and

(3) establishment of racially discriminatory working conditions by creating "white jobs" and "black jobs."

In particular, the complaint alleges that Plaintiff was denied promotions in November 1996, February 1997, April 1997, November 1997 and January 1998. She further contends that she was paid less than her white co-workers. Finally, she alleges that the system Entergy uses for classifying positions, and hiring for those position, has created a situation in which certain jobs are held only by whites and certain ones are held by blacks.

Defendants have moved for summary judgment asserting that the evidence in the record does not present a genuine issue of material fact as to any of Plaintiff's claims. Plaintiff has filed a motion to strike the affidavit of James Cooley, which Defendants attached as an exhibit to the summary judgment motion.

II. The Motion to Strike

Plaintiff has moved to strike the affidavit of James Cooley. Plaintiff first argue that the affidavit should be striken because therein Cooley, the Manager of Human Resources for Grand Gulf Nuclear Station, testifies to things that pre-date his employment at the Grand Gulf facility. Even though he may have no first hand knowledge of events that pre-date his employment, the Court finds that Cooley has testified only to the contents of Plaintiff's personal records which are certainly within his personal knowledge, given his position. See FDIC v. Patel, 46 F.3d 482, 484 95th Cir. 1995); Federal Sav. & Loan Ins. Corp. v. Griffin, 935 F.2d 691, 702, (5th Cir. 1991).

Plaintiff next agrues that the Cooley affidavit should be stricken because the personnel records which support Cooley's testimony were not disclosed to plaintiff in discovery. However, as the supplement pre-discovery disclosures of Defendants indicate, Defendants did disclose the personnel records to Plaintiff. Defendants did not provide Plaintiffs with a copy of the records, but did disclose them as a potential source of discovery and stated that copies were not provided due to the voluminous nature of the records. Defendants clearly stated that the records would be made available for review upon Plaintiff's request. Plaintiff apparently never requested to view the records. Therefore, Plaintiff's motion to strike is denied.

III. The summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states in relevant part that summary judgment "shall be rendered forthwith if the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof of trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see also Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir. 1989); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the records in the case which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to

support the non-moving party's claim. Id. at 323-324. The non-moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighing conflicting evidence, ... since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is improper where the court merely believes it unlikely that the non-moving party will prevail at trial. National Screen Ser. Corp. v. Poster exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962). However, "summary judgment should be granted ... when the nonmoving party fails to meet its burden to come forward with facts and law demonstrating a basis for recovery that would support a jury verdict." Little v. Liquid Air Corp., 73 F.3d 1069, 1071 (5th Cir. 1994).

A. The Analytical Framework

Generally in cases involving employment discrimination, the plaintiff has the initial burden of establishing a prima facie case of discrimination. Rhodes v. Guberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996) (applying the "McDonnel Douglass-Burdine" analysis and citing Texas Dep't. of Community Affairs v. Burdine. 450 U.S. 248, 252-53, 101 S. Ct. 1089, 1093, (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973)). In order to prove a prima facie case of race discrimination, the plaintiff must show that she suffered an adverse employment action due to her race. See Chaney v. New Orleans Pub. Facility Management, 179 F. 3d 164, 167 (5th Cir. 1999); Mattern v. Eastman Kodak, 104 F.3d 702, 705-07 (5th Cir. 1997). The burden then shifts to the Defendant "to proffer a legitimate, nondiscriminatory reason for the challenged employment action," which requires presentation of evidence that, if believed by a jury, would lead to a finding that there was no discriminatory intent. Rhodes, 75 F.3d at 992-93. "The defendant need not persuade the court that it was actually motivated by the proffered reasons." Burdine, 450 U.S. at 254, 101 S. Ct. at

1089. The proffer of the reason is enough to shift the burden back to the plaintiff. Id. Finally, once the defendant has met its burden, the burden shifts back to the plaintiff to prove that the proffered reason for termination was merely pretextual. Rhodes, 75 F.3d at 993.

B. Plaintiff's Claims for Failure to Promote

In her complaint, Plaintiff alleges that she was denied the following promotions because of her race: Site Administrative Programs Coordinator in November 1996, Administrative Coordinator in February 1997, Senior Secretary and Secretary III in April 1997, Senior Procurement Secretary in November 1997, and Secretary in January 1998. However, since filing the complaint, Plaintiff has dropped all of these claims except for Site Administrative Programs Coordinator in November 1996.

In fact, in her response to the motion for summary judgment, Plaintiff included a motion under Rule 41 of the Federal Rules of Civil Procedure for voluntary dismissal of all the others. The Court finds that motion well taken. However, in her deposition, Plaintiff for the first time raised a claim for failure to promote her to the

position of Procurement Specialist III in September 1999. This new claim was obviously not contained in the original complaint, and Plaintiff has not amended her complaint to include it. Plaintiff's request for dismissal of those claims contained in the complaint which she admits she can not support does not cure her failure to include all her claims in the complaint. Rule 8 of the Federal Rules of Civil Procedure requires a complaint to contain "a short and plain statement of the claim." The inclusion of some similar claims does not necessarily give the defendants notice of the claims asserted against them. This is especially true in a case such as this, where Plaintiff alleged specific instances of Defendants' failure to promote her and failed to mention the claims she presently seeks to pursue. Defendants had no notice of any claims beyond those contained in the complaint until Plaintiff's deposition. Also significant is the fact that Plaintiff has not attempted to amend her complaint, but even if Plaintiff did seek to amend her complaint, it is unlikely the Court would allow such an amendment at this late stage in the litigation in order for Plaintiff to avoid summary judgment.

The Court does address, however, Plaintiff's last remaining claim for failure to promote regarding Site Administrative Programs Coordinator in November 1996. To prove a prima facie case of racial discrimination in a failure to promote claim, the plaintiff must demonstrate (a) she is a member of a racial minority; (b) that she was qualified for a position and applied for it; (c) that she was not hired to the position; and (d) that a member of the racial majority was hired to the position or that the employer continued to seek applications with the Plaintiff's qualifications. See Grimes v. Texas Dept. of Mental Health, 102 F.3d 137, 140 (5th Cir. 1996); Meineck v. H&R Block of Houston, 66 F.3d 77, (5th Cir. 1995). Plaintiff has established a prima facie case. Defendants confess as much. Plaintiff is black, a racial minority. She has established that she was qualified for the position of Site Administrative Programs Coordinator when it was offered in November 1996. She was clearly not hired to the position. Finally, not only were additional applications accepted for the position, it was awarded to a white female, Karen Rucker.

The burden, therefore, shifts to Defendants to offer a legitimate, nondiscriminatory reason for not hiring Plaintiff to the

position. Rhodes, 75 F.3d at 992-93. Defendants give two reasons for why they hired Rucker over Plaintiff: (1) although Plaintiff met the minimum qualifications, Rucker was more qualified, and (2) Rucker was known to be compatible with the person for whom she would be working, Joseph Hagan, because he had worked with her before and knew of her capabilities.

Regarding the first reason given, clearly, the fact that those interviewing applicants for the position found Rucker to be more qualified than Plaintiff is a legitimate nondiscriminatory reason for choosing the white applicant. Defendants assert that Rucker's background and the fact that she spoke several different languages made her a more desirable candidate.

Therefore, the burden shifts back to Plaintiff to prove that the reason given by Defendants for not hiring her is merely pretextual. The United States Supreme Court has stated in order to prove pretext, the Plaintiff must prove (1) that the reasons given by Defendant were false and (2) that the real reason was discrimination, neither of which Plaintiff has proven. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) discussing Burdine).

Plaintiff has failed to prove that Rucker's previous work experience and fluency in several foreign languages, which Defendants assert made Rucker a much more appealing candidate for the position, did not in fact make Rucker more qualified for the position. Plaintiff argues that the reason given by Defendants for not hiring her is pretextual because she met the qualifications for the position as they were originally posted and Defendants changed the qualifications and re-posted the position without hiring her. However, Plaintiff confesses that Defendants changed the qualifications to make them match Rucker's qualifications, not simply because she was white. Plaintiff claims, without any supporting evidence, that Rucker still did not meet the minimum qualifications because she did not have proof of a high school equivalent education. This is refuted by Defendants with evidence that Rucker did have proof of a high school equivalent education, and Plaintiff has presented no evidence to the contrary.

Even if Plaintiff proved pretext as to the qualifications reason given by Defendants for not hiring her, Defendants gave the alternate reason of personal compatibility. Plaintiff has done nothing to prove

that this reason was pretextual, and Defendants cite other courts which have recognized personal compatibility as a legitimate nondiscriminatory reason for making employment decisions. See Ramey v. Bowsher, 915 F.2d 731, 735-36 (D.C. cir. 1990); Krulick v. Board of Educ., 781 F.2d 15, 21 (2nd Cir. 1986).

The only evidence Plaintiff has that discrimination was the real reason she was not hired is her own subjective feeling that she has been discriminated against, which is insufficient to avoid summary judgment. See Grimes, 102 F.3d at 139-40; Lawrence v. University of Texas Med. Branch at Galveston, 163 F.3d 309, 313 (5th Cir. 1999). For all these reasons, the Court finds that Defendants are entitled to summary judgment on Plaintiff's claims for failure to promote.

C. Plaintiff's Disparate Wages Claim

Plaintiff also claims that she has been paid disparate wages on the basis of her race. "To establish a prima facie case of racial discrimination with respect to compensation, the plaintiff must show that he was paid less than a member of a different race was paid for

work requiring substantially the same responsibility." Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071, 1074 (5th Cir. 1981). Plaintiff in this case has not presented any evidence showing that she was paid any less than her white co-workers.

Plaintiff has provided evidence that she asserts proves that the procedure used by Entergy to establish starting pay, and to grant merit pay raises, was arbitrary. Plaintiff has even presented evidence that people with different position titles, but with the same job responsibilities, were paid at different rates. However, even if Plaintiff has proven that the procedure for determining pay rates is arbitrary, she has pointed to no evidence in the record which indicates that her, or any other black employee's arbitrary pay rate was any less than the arbitrary pay rates of white employees with the same job responsibilities. Defendants are, therefore, entitled to summary judgment on Plaintiff's disparate wages claim.

D. Plaintiff's Discriminatory Working Conditions Claim

Finally, Plaintiff claims that she was subjected to discriminatory working conditions. In her complaint, she claims that

the criteria used by Entergy for awarding merit pay raises and promotions and determining job classifications has created a system of "white jobs" and "black jobs." It is not completely clear what sort of claim this is. It could be construed as a disparate impact claim, which is cognizable under Title VII. Such a claim does not require intention discrimination and may be based on statistical disparities that disadvantage the members of a protected class. See Munoz v. Orr, No. 97-50736, 2000 WL 6156 (5th Cir. Jan. 5, 2000). However, Plaintiff expressly termed her claim as a one for a violation of § 1981, which requires a showing of intentional discrimination. National Ass'n of Gov't Employees v. City Public Serv. Bd. of San Antonio, 40 F.3d 698, 714 (5th Cir. 1994) (citing General Bldg. Contractors Ass'n. Inc. v. Pennsylvania, 458 U.S. 375, 390-92, 102 S. Ct. 3141, 3158 (1982)).

Plaintiff has provided some statistical evidence that the high-skilled jobs at Grand Gulf Facility are held predominately by white employees, while the low-skilled jobs are held predominately by blacks. However, she has not shown how this evidence proves that she has been discriminated against. Although statistical evidence

may be probative of discriminatory intent, the particular evidence presented by Plaintiff, without more, is not sufficient to avoid summary judgment. The least Plaintiff needs in order for her statistical evidence to be sufficient to created a fact question is to "draw a comparison between the prcentage of minorities in the workforce and the percentage of qualified minorities in the relevant candidate pool." Scales v. Slater, 181 F.3d 703, 708 n. 5 (5th Cir. 1999); See also EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1184 (5th Circ. 1996). Plaintiff has stated, without citing any authority, that the general population of the counties surrounding the Grand Gulf Facility is predominately black.[2] However, she does not offer any evidence of the correlation, if any between the ratios of the black-white populations and the blacks qualified to hold the jobs in question and the whites that are presently holding them.

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[2] The Court could, if asked, take judical notice of the census records to prove this fact, but has not been asked to do so.

Kodak, 104 F.3d 702, 705-07 (5th Cir. 1997). The Court thus finds that Defendants are entitled to summary judgment on Plaintiff's discriminatory working conditions claim.

In addition, Plaintiff's statistical evidence does not prove she, individually, has suffered discrimination either intentionally or by disparate impact. She does not claim to have been qualified for the high-skilled jobs which she asserts are predominately held by white employees. Plaintiff's subjective beliefs that she was a victim of discrimination are insufficient to avoid summary judgment. See Grimes, 102 F.3d at 139-40; Lawrence v. University of Texas Med. Branch at Galveston, 163 F.3d 309, 313 (5th Cir. 1999). Plaintiff has failed show, or even allege, that she suffered any sort of adverse employment action, which is a general requirement for maintaining a cause of action based on discrimination. See Mattern v. Eastman Kodak, 104 F.3d 702, 705-07 (5th Cir. 1997). The Court thus finds that Defendants are entitled to summary judgment on Plaintiff's discriminatory working conditions claim.

V. Conclusion

For the foregoing reason:

IT IS THEREFORE ORDERED that the motion of Defendants for summary judgment is hereby granted.

IT IS THEREFORE FURTHER ORDERED that Plainfiff's motion to strike the affidavit of James Cooley is hereby denied.

A separate final judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure will be entered this day.

SO ORDERED this the __2nd__ day of March 2000.

____/s/__William H. Barbour, Jr._____

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
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JANICE GRAY
PLAINTIFF

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ENTERGY OPERATIONS, INC.,
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FINAL JUDGMENT

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/s/ William Barbour, Jr.

UNITED STATES DISTRICT JUDGE